

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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**No. 365**

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NATIONAL UNION FIRE INSURANCE COMPANY,  
*Petitioner,*

*vs.*

E. ROGERS, INDIVIDUALLY, AND AS CLAIMANT OF THE TUG  
FANNY D. AND BARGE TEXAS NO. 2.

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**BRIEF IN SUPPORT OF THE PETITION FOR A WRIT  
OF CERTIORARI.**

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**I.**

**Opinion of the Court Below.**

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 112 F. (2d) 347.

The District Judge (United States District Court, Southern District of Texas) handed down no formal opinion but his findings of fact and conclusions of law are set forth in the transcript, pages 48-52.

**II.**

**Statement of Jurisdiction.**

The statute on which the jurisdiction of this Court is predicated is Section 240 (a) of the Judicial Code, as amended (U. S. C. Title 28, Sec. 347), providing for the

issuance of writs of certiorari by the Supreme Court of the United States. The Circuit Court of Appeals on July 8, 1940, entered the order denying the petition for rehearing filed with it by petitioner (R. 114).

### III.

#### **Statement of the Case.**

A full statement of the case has already been given under the heading "A" in the petition for a writ of certiorari, and need not be repeated here, save for the following summary.

The tug *Fanny D.* was uninsured. The barge *Texas No. 2* was insured by petitioner under the policy summarized in the foregoing petition and annexed hereto as an exhibit. The tug and the barge were both owned by Eggers, respondent herein.

The barge was without crew, propelling power, or steering gear. While being navigated, controlled, and directed by the attached tug *Fanny D.*, the tug negligently permitted the barge to collide with a moored vessel. By the decision of the District Court in the collision case and the affirmance by the Circuit Court of Appeals in that case it is settled that the barge was without fault and that Eggers as her owner and claimant was likewise without fault. The sole negligence for which Eggers was held responsible for this collision was that arising against him as owner and claimant of the tug and out of the operation of the tug.

### IV.

#### **Specification of Error.**

The Circuit Court of Appeals for the Fifth Circuit erred in the following particular:

In construing the full collision clause in the hull policy on the barge *Texas No. 2* so as to impose liability on her

underwriter for collision damages caused solely by the negligent navigation of the uninsured tug *Fanny D.* while towing the barge, on the sole ground of common ownership of the vessels.

## V.

**Argument.**

Under the facts above set out, the legal liability is solely that of the tug and her owner and not that of the tow and her owner.

*Sturgis v. Boyer*, 65 U. S. 110;

*The C. W. Mills*, 241 Fed. 204 (S. D. Ala.), affirmed  
241 Fed. 378 (C. C. A. 5).

The common ownership of the tug and tow does not affect or change this principle of law.

*Liverpool, Brazil & River Plate Line v. Brooklyn Eastern District Terminal*, 251 U. S. 48, 52;

*Union S. S. Co. v. The Aracan*, 2 Aspinall Maritime Cases 350, L. R. 6 P. C. 127.

Accordingly the effect of the decision of the Circuit Court of Appeals in the declaratory judgment suit is to impose liability on an underwriter covering the collision liability of a barge and her owner for the collision liability of an uninsured tug and her owner when no fault, actual or imputed, is chargeable to the barge. This extraordinary conclusion could only result from perfectly clear and unmistakable language in the barge policy. Such language is not to be found therein. On the contrary, the terms of the full collision clause in the barge policy, when read with the entire policy, are such as to show perfectly clearly that the clause covered only the collision liability of the assured *in his capacity as owner of the barge, and in no other capacity.*

The pertinent part of the full collision clause in the policy on barge *Texas No. 2* provides:

"\* \* \* if the vessel hereby insured shall come into collision with any other ship or vessel and the assured \* \* \* in consequence thereof \* \* \* shall become liable to pay and shall pay by way of damages to any other person \* \* \* any sum or sums in respect of such collision, we, the underwriters, will pay the assured," etc. (Emphasis ours.)

1. The barge underwriter is to pay if "the assured \* \* \* in consequence of" a collision between the barge and another vessel "shall become liable to pay" damages.

"In consequence of" means "because of"; "resulting as a matter of cause and effect".

Did this assured become "liable to pay" because of the collision between the barge and the ship, or because of his negligence in the operation of the tug?

The question answers itself. Had there been no negligence, there would have been no liability. In the case at bar, by the decision of the District Court and the affirmance by the Circuit Court of Appeals, no liability was imposed on the barge or on her owner, as such owner. Liability *was* imposed on the tug and her owner, as such owner, because of the *negligent* navigation of the tug.

In a legal and accurate sense, no collision causes liability. The legal liability arises out of the negligence that is the proximate cause of the collision. For example, no liability arises out of a collision due to inevitable accident.

The barge and her owner did not cause the liability growing out of this collision. The barge was merely the dumb and innocent instrument propelled into the collision by the negligent navigation of Eggers acting as master of the tug.

2. The conclusion that the full collision clause requires the underwriter to pay only when, as a consequence of the

collision there arises in favor of a third person, a legal liability on the barge and her owner in his capacity as such owner is confirmed by the language in the last part of the clause, "but when both vessels are to blame \* \* \* claims under the collision clause shall be settled on the principle of cross liabilities \* \* \*".

This thought is aptly put by the English Court of Appeals construing a similar full collision clause in the case of *Hall Brothers Steamship Company, Ltd., v. Young* (March, 1939), 44 Times Commercial Cases, page 146; (1939) 1 K. B. 748. There the court held that the phrase in the clause "by way of damages" included only the results of negligent acts on the part of the insured vessel and not liabilities growing out of a special statute and not dependent on negligence. Sir Wilfrid Greene, M. R., said (page 151):

"Proceeding with the clause, it is to be noticed that in the last branch of the clause there occurs the phrase 'but when both vessels are to blame'. That phrase seems to me to throw light upon the construction of the earlier part of the clause and to confirm what I have been saying about it. The phrase 'but when both vessels are to blame', imports the idea that what the clause is dealing with is a case *where the vessel insured is to blame*, that is to say, has been guilty of some breach of duty (normally, the duty to take care), and the last part of the clause makes special provision for the case where the other vessel also is to blame." (Emphasis ours.)

3. The provisions of the policy all deal with a particular barge and with the losses and liabilities of that barge and of Eggers as owner of the barge. This is emphasized by the sister-ship salvage clause and the sister-ship collision clause, which outline the procedure to be followed when two vessels owned by the assured are involved in a salvage

situation or are in collision with each other. Throughout the policy the insured vessel, as the basic subject matter of the insurance, is treated as an entity. To excerpt, as the court below did, the full collision clause from the text and to endeavor to read it without the context—the barge policy as a whole—is to violate the cardinal rule of contract construction and interpretation.

Insurance rates are based on the particular vessel insured: her type, whether propelled or nonpropelled, whether steering or nonsteering, whether an ocean-going or an inland vessel, a tug, or a barge, the uses to which she will be put, her age, etc. All these factors and others affect the risk on the vessel and the exposure of the underwriter and correspondingly determine the rate. An underwriter insuring the liability of the owner of a barge for collision damage certainly does not intend insuring the collision liability of that owner as the owner of the towing tug.

The tug is nearly always the controlling vessel—her master and crew navigate and maneuver her and her tow—and the risk of collision liability on a tug owner is much greater than such risk on a barge owner. Hence the tug owner and his tug pay a higher insurance rate.

The insurance rate on the tug *Fanny D.* was 9.75%; the rate on the barge *Texas No. 2* was only 2.208% (R. 71).

4. Eggers contended in the lower court that if the collision clause in the barge policy does not cover the negligence of the tug, then the underwriter sold him nothing under the barge policy. This is not true. The barge policy protected the oil barge in the amount of \$17,500.00 against partial or total loss from collision, fire, explosions, theft, perils of the sea, and other perils insured against, against salvage charges, general average, etc. The collision clause in the barge policy was merely a minor part of the policy included in the printed form. It would, however, include barge col-

lisions caused by her going adrift on account of improper mooring by the barge owner, parting of the barge lines under circumstances not amounting to inevitable accident, collisions brought about by sheering of the barge due to improper loading, or by slack water in her tanks, etc. In short, the barge collision clause would cover any collision brought about by the fault of the barge or of her owner as owner of the barge. In the nature of things this does not often happen, and that is why the rate on the barge policy is so low.

5. The origin and history of the collision clause demonstrate its scope and meaning. It was adopted by English underwriters more than 100 years ago as a result of the decision in the case of *De Vaux v. Salvador* (1836), 4 Ad. & E. 420, which held that the words "perils of the seas" as used in a hull policy did not cover the collision liability of the owner of the insured vessel to the vessel collided with, though they did include the damages sustained by the insured vessel and her owner. *Arnould on Marine Insurance and Average*, 12th Edition, pages 20, 1051. Thus the purpose of the clause was to protect the owner of the insured vessel against liabilities his vessel and he as its owner might incur by reason of a collision with another vessel. The clause was adopted to supplement the provisions of the hull policy as restricted by the *De Vaux v. Salvador* decision. During its century of life in America and England the clause has always been considered to include only those liabilities of the assured incurred by him as owner of the insured vessel. Though the clause has a number of times been before the courts, no court, English or American, save the court below, and no textbook writer or commentator has ever expressed the contrary view.

6. The only case directly in point is *Kelly Island Lime and Transport Company v. Commercial Assurance Com-*

pany, Ltd., decided by the Ohio Court of Appeals on July 23, 1923, and reported in 1923 American Maritime Cases, page 959. In that case the court interpreted substantially the same full collision clause under circumstances identical with those in this case, including common ownership of the tug and tow. The following is the syllabus of the case on the point here at issue as reported in American Maritime Cases:

“Marine Insurance—Running Down Clause—Effect of Common Ownership of Tug and Tow.

“1. Underwriters on a vessel in tow which was in collision with a third vessel are not liable under the ‘running down’ or collision clause for damage paid by the assured, who was also the owner of the tug, under a decree finding the tug solely at fault, and ordering payment by the assured as owner of the tug.”

The court said in part:

“When the parties made this contract it must be assumed that both understood and intended that when the assured became liable by reason of a collision it must be such a liability, and only such, as could be enforced in a court of law against the assured. It necessarily follows from this that under the facts in the instant case if some party other than the assured had owned the (tug) Sanders no claim of the assured could be made under this clause of the contract against the Assurance Company. These facts lead to the further conclusion that by the provisions of the contract in question the parties must have contemplated that a basis for the liability of the assured to pay there must be, in some degree at least, a responsibility on the part of the barge for the collision. Unless the collision occurred by the fault of the barge, and such fault was either a proximate or contributing cause of the collision, there could be no liability on the part of the Transport Company in its capacity as owner of the barge to pay any third person for any damage resulting from said

collision. So that it may be said that woven into this provision in respect to liability, and as a necessary part or element thereof, is a further legal responsibility on the part of the barge for the collision. This is not only the natural effect of the language used, but, in our judgment, is the necessary legal effect of such language. *We can not conceive that such language imports that the assured in any capacity other than that as the owner of the barge was intended by the parties to be indemnified against the claims of third persons from a collision in which the barge might be involved. We are unable to adopt the view that this clause of the contract furnishes any indemnity to the assured other than that which covers its transactions as owner of the barge.* Now, as before observed, the barge has been absolved by the decree of the Federal Court from any responsibility in connection with the collision. Not only has it been thus relieved from liability, but that court has found further that the tug *Sanders* was the sole cause of the collision and the Transport Company as the owner of the tug, not as the owner of the barge, was adjudged to pay the resulting damage to the *Breitung*. These facts, in our judgment, relieve the Assurance Company from any liability under said collision clause." (Emphasis ours.)

For the convenience of the court, we print as an appendix to this brief all of the opinion in the above case dealing with the point here involved.

## VI.

### Conclusion.

Eggers has not been held liable for this collision by reason of his ownership of the barge. Were this his only connection with the affair, there could be no decree against him. Eggers has been held liable because of his ownership of the tug. The tug carried no insurance and the National Union Fire Insurance Company, petitioner, was in no way inter-

ested in the operation of the tug or in liabilities growing out of such operation, or in the protection of any one, whether owner or otherwise, who might become liable by reason of the tug's operations.

We submit that the lower court's construction of a marine insurance policy on one vessel that has the effect of imposing liability on her underwriter for the negligent operation of another vessel is clearly erroneous.

The untenable decision of the lower court overturns the long-standing and universally accepted interpretation in marine insurance circles of the standard full collision clause forming part of the standard hull policy. It finds no support in any case, American or British, nor in any textbook or commentary on marine insurance law. It affects rights, vested and contingent, under numerous marine policies issued in America and in England. It has so disturbed marine underwriters of the United States that thirty-five of them, as *amici curiae*, filed in the Circuit Court of Appeals a brief in support of this petitioner's application for a rehearing.

The question presented is accordingly of general marine insurance law and of nation-wide importance.

We submit that the case is preeminently one for the exercise of this Court's supervisory jurisdiction, and we earnestly pray that this Court grant a writ of certiorari.

Respectfully,

GEO. H. TERRIBERRY,  
JOS. M. RAULT,  
WALTER CARROLL,  
*Proctors for Petitioner.*

New Orleans, Louisiana, August 15, 1940.